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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 JAMES NELLUMS,

11 *Petitioner,*

12 vs.

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14 D.W. NEVENS, *et al.,*

15 *Respondents.*
16

2:05-cv-00836-RLH-RJJ

ORDER

17 This habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on
18 the merits on the remaining claims, *i.e.*, on the claims of ineffective assistance of counsel in
19 Grounds 1, 2, 7 and 9.

20 ***Background***

21 Petitioner James Nellums seeks to set aside his 1999 Nevada state court conviction,
22 pursuant to a jury verdict, of first degree murder with the use of a deadly weapon, attempted
23 murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and
24 attempted robbery with the use of a deadly weapon.¹
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27 ¹Petitioner additionally was convicted in the same judgment of possession of a firearm by an ex-felon,
28 pursuant to a plea. The claims before the Court do not appear to challenge the conviction on this charge. To
the extent, if any, that petitioner does seek to overturn the conviction on the firearm charge, the Court rejects
this challenge for the reasons assigned in footnote 51.

1 The evidence at trial included the following.²

2 The surviving victim, Hilario Rodriguez, testified as follows. On the evening of March
3 25, 1997, he and his father, Nicholas Rodriguez, were taking a neighborhood path through
4 some vacant desert land from their home to a store. It was approximately 7:50 p.m. in the
5 evening, and it was dark outside. The only lighting came from streetlights from the streets on
6 two sides of the vacant land.³

7 As they were walking through the area, they saw a black male walking toward them.
8 The man pointed a gun at them and said several words in English, but the only word that
9 Hilario Rodriguez understood was "stop." The man tried to hit Hilario Rodriguez with the gun,
10 causing him to fall backwards. The man then shot his father, with Rodriguez hearing "about
11 three" gunshots. Hilario Rodriguez got up and tried to stop the assailant, who then shot him
12 in the right upper arm near his armpit and in his left leg just below the kneecap. Rodriguez
13 fell to the ground face down, and he thought that he was dying. He heard the assailant come
14 close to him. He heard the gun click, but it did not fire.⁴

15 The assailant then pulled Hilario Rodriguez' wallet from his left pocket. Rodriguez had
16 \$2 in the main section of the wallet for bills, and he had another \$200 hidden in a credit card
17 slot that he was planning to send to his mother in Mexico. Rodriguez never saw his wallet
18 again.⁵

19 Hilario Rodriguez saw the man walk a short distance toward a small fence and retrieve
20 a bicycle from the bushes. The bicycle was a black or dark mountain bike with chrome
21 handlebars. #15, Ex. 2A, at 55-56, 69-70 & 78.

22
23 ²The Court makes no credibility findings or other factual findings regarding the truth or falsity of
24 evidence or statements of fact in the state court. The Court summarizes same solely as background to the
25 issues presented in this case. No statement of fact made in describing statements, testimony or other
evidence in the state court constitutes a finding of fact by this Court.

26 ³#15, Ex. 2A, at 48-52, 56-58 & 69.

27 ⁴*Id.*, at 52-54, 69, 72 & 78-79.

28 ⁵*Id.*, at 54-55.

1 The assailant was wearing what appeared in the lighting to be dark blue pants and a
2 dark blue jacket together with a cap. The gun was a small dark-colored pistol. The assailant
3 was holding the pistol with both hands, showing only a portion of the barrel.⁶

4 Nicholas Rodriguez did not survive the attack. Investigating police officers and crime
5 scene investigators recovered a brown wallet about ten feet from where his body was found.
6 He carried a wallet that was consistent with the wallet recovered. Bicycle tracks were
7 observed nearby. Investigators observed a multitude of bicycle tire tracks in the desert in the
8 general area, including a wavy, knobby type of tread consistent with a mountain bike. The
9 area was well-traveled, however, making it difficult to tie the tracks to a particular bicycle.⁷

10 Investigators initially recovered an unexpended .25 caliber cartridge with the initials
11 "R.P." on it. At dawn the following morning, Maria Rodriguez, Nicholas Rodriguez' daughter-
12 in-law, also observed three shell casings at the crime scene. She picked up the casings, and
13 she placed them in a plastic bag when she returned to the nearby house. After going to
14 Mexico to bring Nicholas Rodriguez' wife to Las Vegas, Maria Rodriguez brought the casings
15 to the police on March 28, 1997. Investigators then went back to the crime scene during the
16 day on March 28, 1997, and recovered an additional expended .25 caliber shell casing.⁸

17 Priscilla Scott testified as follows. She had been in a relationship with James Nellums
18 for the eight years, and they had an eight-year-old daughter. In March 1997, they were living
19 together along with their daughter and Scott's four other children.⁹

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22 ⁶#15, Ex. 2A, at 58-60 & 78. See also #15, Ex. 2A, at 34-45 (testimony of the first responding patrol
23 officer regarding first observations of the crime scene and victims); *id.*, at 81-83 (an initially responding
neighbor); *id.*, at 84-92 (early responding friends); *id.*, at 92-102 (investigating detective).

24 ⁷#15, Ex. 2A, at 40 & 43 (first responding patrol officer); *id.*, at 61 (Hilario Rodriguez); *id.*, at 97 & 99-
25 100 (investigating detective James Jackson); #15, Ex. 2B, at 8 (investigating detective Jonathan Martin); #15,
Ex. 2B, at 32-39 (crime scene investigator Derek Nelson).

26 ⁸#15, Ex. 2A, at 97-99 (detective); *id.*, at 102-12 (Maria Rodriguez); *id.*, at 112-14 (chain of custody
27 after delivery of the casings to the police); *id.*, at 114-20 (crime scene investigator Pamela Sword Frakes);
#15, Ex. 2B, at 32-36 & 49-50 (crime scene investigator Derek Nelson).

28 ⁹#15, Ex. 2A, at 120-22. Scott and her children also called Nellums "Squeaky."

1 On the evening of March 25, 1997, Nellums returned to the apartment after having
2 been out. He came back inside with his bicycle, which was a dark blue Huffy mountain bike
3 with chrome handlebars with black pads. Nellums walked directly to the bathroom, and he
4 called Scott to the bathroom. When she got to the bathroom, there was blood everywhere.
5 She asked him what happened, and Nellums told her that he had attacked two men walking
6 in the desert.¹⁰

7 As he related to Scott, Nellums went to the desert that evening because Mexican-
8 Americans got paid every Friday, and he wanted to see what he could get through a robbery.
9 There were two men walking though the desert, and he came out from behind some bushes.
10 Nellums attacked the smaller man first, but the larger man responded by attacking Nellums
11 with a knife and cutting him on the arm. Nellums shot the two men, and he then left on his
12 mountain bike. He said that the smaller man only had \$2.¹¹

13 Back at the apartment, Nellums had a still-bleeding cut to the left upper arm, on the
14 inner side running from the shoulder toward the elbow. He had Scott wrap the wound with
15 a towel. Nellums was wearing a black and turquoise Adidas jacket with a gray t-shirt under
16 it and black jeans. Nellums asked Scott to get rid of the clothes, but Scott hid the jacket and
17 shirt on the top shelf of the hall linen closet, behind some blankets. She and Nellums went
18 to the store and bought a beer with the \$2.¹²

19 The next day, a story about the attack in the desert was on the television news. When
20 the newscast said that the larger man had died, Nellums said: "What, he died? Oh, well. He
21 shouldn't have resisted." Thereafter, whenever the story would play over the course of the
22 day, Nellums would repeat basically the same response.¹³

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25 ¹⁰#15, Ex. 2A, at 122 & 140.

26 ¹¹*Id.*, at 122-24, 145-46 & 148-49.

27 ¹²*Id.*, at 123-26, 141, 143-44, 146-47 & 150-51.

28 ¹³*Id.*, at 126-27.

1 Scott was afraid due to the fact that she was the only one that Nellums had told about
2 the crime. They had a history of domestic violence. Nellums told her that he knew that she
3 was the only one that knew and that he knew that she would not tell anyone. She interpreted
4 his remarks as meaning that he would do the same thing to her as the victims if she talked.
5 As a consequence, she was afraid to tell anyone.¹⁴

6 In June 1997, Scott had been at her father's home for about a week, and the children
7 were at her mother's home. On June 18, 1997, Nellums called Scott regarding her coming
8 home. He asked whether she lived there anymore. She responded that she still lived there.
9 He then told her that "I think you better get your mother f___ing ass home before I . . . kick
10 it all the way home." He also referred to her mother, stating: "Tell your ball-headed ass mom
11 to bring you home." This statement upset Scott, as her mother had lost all of her hair
12 because she was being treated for cancer.¹⁵

13 Right after the call, Scott's mother arrived at her father's house. Scott told her mother
14 that she knew something that Nellums had done. She then told her mother about Nellums
15 having shot the two men in March 1997. Her mother urged her to contact the police, which
16 she did that day.¹⁶

17 The police took Scott's statement. Her story had potential credibility because she knew
18 details regarding the crime that were not public knowledge.¹⁷

19 As discussed further below under Ground 1, Scott signed a written consent form giving
20 the police permission to search the apartment.¹⁸

21 When officers initially were reconnoitering the area outside the apartment prior to the
22 search, Nellums exited the apartment with a black mountain bike with knobby tires. The
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24 ¹⁴#15, Ex. 2A, at 127-28, 144-45 & 149.

25 ¹⁵#15, Ex. 2A, at 128-30 & 145.

26 ¹⁶*Id.*, at 130-32 & 142-43.

27 ¹⁷*Id.*, at 131-32 (Scott); #15, Ex. 2B, at 10-16 & 29-30 (investigating detective Jonathan Martin).

28 ¹⁸#15, Ex. 2A, at 132.

1 officers took Nellums into custody and impounded the bicycle. At trial, both Priscilla Scott and
2 her daughter identified the bicycle as Nellum's bicycle; and Priscilla Scott testified that he had
3 come back to the apartment with that bicycle on the night of the attack.¹⁹

4 Nellums was observed to have a scar on his left arm, running between the shoulder
5 and bicep, when he was taken into custody.²⁰

6 After Nellums was taken away, the police brought Priscilla Scott to the apartment and
7 effected the search. Inside the apartment, the police recovered, *inter alia*: (a) a blood-stained
8 jacket and t-shirt from the hall linen closet; (b) a watch cap from the bedroom; (c) .25 caliber
9 ammunition from the top of the bedroom closet; and (d) a small, black .25 caliber pistol with
10 an obliterated serial number and a loaded magazine from the top drawer of a night stand in
11 the bedroom. Scott testified that she was with Nellums when he purchased the weapon and
12 that the serial numbers had been scratched off. She testified that the weapon was small
13 enough to fit in one's hand. She further testified that the clothing recovered in the search was
14 the same clothing that Nellums was wearing on the night of the crime. The clothing
15 substantially matched the description given by Hilario Rodriguez.²¹

16 The apartment was approximately 2.4 to 3.1 miles from the crime scene, depending
17 upon the route taken.²²

18 Deputy medical examiner Dr. Robert Bucklin, M.D., testified that Nicholas Rodriguez
19 was hit by two bullets, one nonfatal bullet which passed through his body without striking any
20 vital structures and one fatal bullet. He testified that Rodriguez died from a gunshot to the
21 chest that passed into the abdomen. The fatal bullet passed through the aorta and the spinal
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23 ¹⁹#15, Ex. 2A, at 140 (Priscilla Scott); *id.*, Ex. 2B, at 3-4 (Penny Scott); *id.*, Ex. 2B, at 16-18 (Detective
24 Martin).

25 ²⁰#15, Ex. 2B, at 21 (Detective Martin); *id.*, at 50-52 (transport officer).

26 ²¹#15, Ex. 2A, at 132-37, 144 & 151 (Priscilla Scott); see also *id.*, Ex. 2B, at 4-5 (testimony by Priscilla
27 Scott's daughter Penny regarding the jacket); *id.*, Ex. 2B, at 18-22, 26-27 & 30-31 (Detective Martin); *id.*, at
40-46 (crime scene investigator Nelson).

28 ²²Ex. 2B, at 21-24 (Detective Martin).

cord before becoming lodged in Rodriguez' spine. During the autopsy, Dr. Bucklin recovered the copper jacketed .25 caliber bullet and turned it over to a crime scene investigator.²³

Richard Good, Sr., the forensic lab manager and a firearm examiner for the Las Vegas Metropolitan Police Department, testified as follows: Nellum's gun that was recovered during the search was a .25 caliber semi-automatic Tangfolio pistol. The .25 caliber bullet recovered from Nicholas Rodriguez' body was fired from Nellum's weapon. Moreover, the expended shell casing initially found at the crime scene and the three casings found by Maria Rodriguez all were ejected from Nellum's pistol. The ammunition recovered during the search also was of the same brand as the ammunition used in the attack.²⁴

Good summarized his findings as follows:

. . . I am saying it is my belief that no other firearm ever manufactured was responsible for the markings found on the four cartridge cases or the autopsy bullet.

#15, Ex. 2B, at 91.

Nellums wrote to Priscilla Scott while he was in jail awaiting trial. The letter stated, *inter alia*, "I have finally opened my heart to God and asked for forgiveness and pray I don't get put to death for what has happen [sic]."²⁵

Additional factual and procedural background pertinent to the individual claims presented is set forth below in the discussion of the respective claims.

Governing Law

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 117 S.Ct. 2059, 2066 n.7(1997). Under this deferential standard of review, a federal court may not grant habeas relief merely on the basis that a state court decision was incorrect or erroneous. *E.g.*, *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Instead, under 28 U.S.C. § 2254(d),

²³#15, Ex. 2B, at 53-60 (Dr. Bucklin); see also *id.*, at 61-65 (chain of custody testimony).

²⁴#15, Ex. 2B, at 70, 81-88 & 90-91.

²⁵#15, Ex. 2A, at 137-40.

1 the federal court may grant habeas relief only if the decision: (1) was either contrary to or
2 involved an unreasonable application of clearly established law as determined by the United
3 States Supreme Court; or (2) was based on an unreasonable determination of the facts in
4 light of the evidence presented at the state court proceeding. *E.g., Mitchell v. Esparza*, 540
5 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

6 A state court decision is “contrary to” law clearly established by the Supreme Court only
7 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or
8 if the decision confronts a set of facts that are materially indistinguishable from a Supreme
9 Court decision and nevertheless arrives at a different result. *E.g., Mitchell*, 540 U.S. at 15-16,
10 124 S.Ct. at 10. A state court decision is not contrary to established federal law merely
11 because it does not cite the Supreme Court’s opinions. *Id.* Indeed, the Supreme Court has
12 held that a state court need not even be aware of its precedents, so long as neither the
13 reasoning nor the result of its decision contradicts them. *Id.* Moreover, “[a] federal court may
14 not overrule a state court for simply holding a view different from its own, when the precedent
15 from [the Supreme] Court is, at best, ambiguous.” *Mitchell*, 540 U.S. at 16, 124 S.Ct. at 11.
16 For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme
17 Court precedent is not contrary to clearly established federal law.

18 A state court decision constitutes an “unreasonable application” of clearly established
19 federal law only if it is demonstrated that the court’s application of Supreme Court precedent
20 to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g., Mitchell*,
21 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003).

22 To the extent that the state court’s factual findings are challenged intrinsically based
23 upon evidence in the state court record, the “unreasonable determination of fact” clause of
24 Section 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d
25 943, 972 (9th Cir. 2004). This clause requires that the federal courts “must be particularly
26 deferential” to state court factual determinations. *Id.* The governing standard is not satisfied
27 by a showing merely that the state court finding was “clearly erroneous.” 393 F.3d at 973.
28 Rather, the AEDPA requires substantially more deference:

1 [I]n concluding that a state-court finding is unsupported by
2 substantial evidence in the state-court record, it is not enough that
3 we would reverse in similar circumstances if this were an appeal
4 from a district court decision. Rather, we must be convinced that
an appellate panel, applying the normal standards of appellate
review, could not reasonably conclude that the finding is
supported by the record.

5 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

6 If the state court factual findings withstand intrinsic review under this deferential
7 standard, they then are clothed in a presumption of correctness under 28 U.S.C. § 2254(e)(1);
8 and they may be overturned based on new evidence offered for the first time in federal court,
9 if other procedural prerequisites are met, only on clear and convincing proof. 393 F.3d at 972.

10 On a claim of ineffective assistance of counsel, the petitioner must satisfy the two-
11 pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
12 (1984). He must demonstrate that: (1) counsel's performance fell below an objective standard
13 of reasonableness; and (2) counsel's defective performance caused actual prejudice. On the
14 performance prong, the issue is not what counsel might have done differently but rather is
15 whether counsel's decisions were reasonable from his perspective at the time. The reviewing
16 court starts from a strong presumption that counsel's conduct fell within the wide range of
17 reasonable conduct. On the prejudice prong, the petitioner must demonstrate a reasonable
18 probability that, but for counsel's unprofessional errors, the result of the proceeding would
19 have been different. *E.g.*, *Beardslee v. Woodford*, 327 F.3d 799, 807-08 (9th Cir. 2003).

20 When evaluating claims of ineffective assistance of appellate counsel, the performance
21 and prejudice prongs of the *Strickland* standard partially overlap. *E.g.*, *Bailey v. Newland*, 263
22 F.3d 1022, 1028-29 (9th Cir. 2001); *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).
23 Effective appellate advocacy requires weeding out weaker issues with less likelihood of
24 success. The failure to present a weak issue on appeal neither falls below an objective
25 standard of competence nor causes prejudice to the client for the same reason – because the
26 omitted issue has little or no likelihood of success on appeal. *Id.*

27 The petitioner bears the burden of proving by a preponderance of the evidence that
28 he is entitled to habeas relief. *Davis*, 333 F.3d at 991.

Discussion

Grounds 1 & 2: Failure to Seek to Suppress Introduction of the Murder Weapon

In Ground 1, petitioner alleges that he was denied effective assistance of counsel when his trial counsel failed to move to suppress introduction of the murder weapon into evidence. In Ground 2, he alleges that he was denied effective assistance of counsel when counsel failed to raise the issue on direct appeal. Nellums alleges that Priscilla Scott did not have the authority to consent to a search of the bedroom night stand drawer where the weapon was located, because he allegedly exercised exclusive control over that particular drawer.

Priscilla Scott testified that she and Nellums had been in a relationship for eight years, had an eight-year-old daughter together, and had lived in the apartment for approximately five to six months. She confirmed the authenticity of her signatures on the written consent form giving the police permission to search the apartment. Prior to proceeding forward with the search based upon Scott's written consent, the police contacted the landlord and confirmed that both James Nellums and Priscilla Scott were named on the lease agreement. Inside the apartment, Scott directed the police to, *inter alia*, Nellums' .25 caliber pistol. The weapon was recovered from the top drawer of the night stand, on what Scott described at trial as her side of the bed, in what she described as her drawer. Scott testified that, on the day following the shootings, she had seen the gun once again placed in the night stand drawer.²⁶

There was no evidence to the contrary in the state court trial record.

In the state post-conviction proceedings, petitioner alleged that "[o]n 06-18-97 [the date of the search] Petitioner . . . was a co-tenant with Priscilla Scott . . . along with their daughter, Jasmine" Nellums maintained that he and Scott were romantically involved when they initially rented the apartment but that the relationship had soured and had become strictly platonic. He maintained that he had become romantically involved with another woman and that he "was living with Scott solely as a co-tenant for mutual financial benefits." According to Nellums, his involvement with his new lover infuriated Scott, so much so that Scott went

²⁶#15, Ex. 2A, at 132-35 & 151 (Scott); *id.*, Ex. 2B, at 15 (Detective Martin).

1 to the police and told them falsely that he had confessed to her. He acknowledged in his
2 state court petition that she then signed a written consent to a search “of her [and] Nellums’
3 apartment.” The copy of the signed consent form attached with the state petition stated, *inter*
4 *alia*, that Scott consented to “a complete search of the premises and property.”²⁷

5 Nellums alleged that the top drawer of the night stand – where the murder weapon was
6 found – was his exclusive property over which he exercised sole access and control. He
7 alleged that the night stand had been given to him as a gift and that he allowed Scott to use
8 the bottom drawer only. He alleged that he had specifically instructed Scott that he did not
9 want her or anyone else going inside the top drawer. He asserted that he kept not only the
10 gun in the top drawer but also personal information regarding his new girlfriend.²⁸

11 Nellums did not contest either the voluntariness of Scott’s consent or that, as a co-
12 tenant, she generally had the authority to consent to a search of the apartment. He
13 contended instead that he had a protected expectation of privacy in the top drawer of the
14 night stand and that Scott’s consent to the search of the top drawer therefore was invalid
15 under the Fourth Amendment. Nellums contended further that the search was
16 unconstitutional because the police deliberately arrested him and took him away from the
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18 ²⁷#15-11, Ex. 4, at 7 & Exhibit E001 thereto. Petitioner cites to page 145 of the trial transcript in
19 support of his allegations regarding the purportedly platonic nature of his relationship with Scott on June 18,
20 1997. In the portion of Scott’s testimony cited, however, she acknowledged only that – throughout their
21 relationship – she had been aware of Nellums’ involvement with other women. See #15, Ex. 2A, at 145 (“I
22 have been aware of that for the past eight years we were together.”). She denied that his alleged involvement
23 with another woman was the subject of their particular problems in June 1997. *Id.* Scott’s remaining
24 testimony, summarized previously, contradicted rather than supported Nellums’ description of their
25 relationship in June 1997. In any event, under the case law discussed *infra*, any issue of fact as to the status
26 of their relationship at the time of the search was not a material one. It was undisputed, even under Nellums’
27 allegations four years after the fact in 2001, that Scott was a co-tenant with Nellums on June 18, 1997.

28 The Court further notes in passing that Nellums’ suggestion that Scott falsely accused him of the
shootings tends to be belied by the remaining evidence in the case tending to establish his guilt. While the
question of whether evidence regarding the gun should have been suppressed is another matter, Nellums’
assertion of actual factual innocence runs counter to substantial evidence of his guilt.

²⁸#15-11, Ex. 4, at 8. The testimony at trial did not reflect that any personal information regarding
another woman was recovered during the search. The only items reflecting personal information that were
inventoried during the search pertained to Nellums and Scott. See, e.g., #15, Ex. 2-B, at 20. Any factual
dispute as to this point, too, ultimately is not material under the case law discussed *infra*.

1 apartment without seeking his consent so that they could proceed with the search based upon
 2 Scott's consent. He additionally contends that the search was unconstitutional because the
 3 police allegedly had a duty to instead obtain a search warrant because a neutral magistrate
 4 was easily available to the police. In order to establish his standing to challenge the search
 5 of the drawer in particular, Nellums affirmatively alleged that he had full ownership of the top
 6 drawer and its contents, including the .25 caliber handgun.²⁹

7 Nellums alleged that he advised his trial counsel of all of the above alleged facts and
 8 requested that he file a motion to suppress.³⁰

9 In its June 13, 2005, decision on the state post-conviction appeal, the Nevada
 10 Supreme Court rejected Nellums' claim of ineffective assistance of counsel on the following
 11 basis:

12 . . . [T]rial counsel's failure to attack a clearly consensual
 13 search was perfectly reasonable. The State emphasizes that
 14 Nellums' girlfriend of eight years, Priscilla Scott, also lived in the
 15 apartment and consented to the search in writing. She had clear
 16 authority to consent to the search. This court has stated that trial
 counsel need not "make every conceivable motion no matter how
 remote the possibilities are of success." Therefore, we conclude
 based on the clearly consensual search that Nellums' argument
 lacks merit.

17 #15-17, Ex. 8, at 3-4.

18 Based upon the controlling case law that would have been available to counsel in 1997
 19 and 1998, the Nevada Supreme Court's rejection of the petitioner's ineffective assistance
 20 claims in Grounds 1 and 2 was neither contrary to nor an unreasonable application of clearly
 21 established federal law as determined by the United States Supreme Court. That is, the

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 23 ²⁹#15-11, Ex. 4, at 8-14. Petitioner included factual allegations, at 12 and 14, that the police admitted
 24 that they had been waiting outside for a long time outside the apartment for Nellums to leave the apartment
 25 so that they could arrest him and remove him from the scene. At trial, however, the officer's testimony
 26 instead reflected that Nellums fortuitously exited the apartment while the police were checking out the exterior
 27 area of the apartment in preparation for bringing in a SWAT team (because they knew Nellums was armed)
 before proceeding with the search. There was no police testimony whatsoever that the police had completed
 their preparation for the operation and thereafter had stopped and waited, for a long time or otherwise, for
 Nellums to exit the apartment. #15, Ex. 2B, at 15-16. This factual point, too, however, was not necessarily a
 material one under the governing case law available to defense counsel in 1997 and 1998.

28 ³⁰#15-11, Ex. 4, at 16.

1 Nevada Supreme Court's determination that a motion to suppress would not have had a
2 reasonable probability of success was neither contrary to nor an unreasonable application of
3 the United States Supreme Court's Fourth Amendment precedent at the relevant time.³¹

4 Because an attorney's performance must be assessed from the lawyer's perspective
5 at the time, it is established law that an attorney is not ineffective for failing to anticipate a
6 decision in a later case. See, e.g., *Murtishaw v. Woodford*, 255 F.3d 926, 950 (9th Cir. 2001);
7 *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994); *United States v. Zweber*, 913 F.3d 705, 712
8 (9th Cir. 1990). Thus, the question of whether trial counsel provided ineffective assistance of
9 counsel in not filing a motion to suppress must be considered in light of the controlling Fourth
10 Amendment case law in 1997 and 1998.

11 In the state courts, Nellums did not challenge the actual authority of his co-tenant Scott
12 to consent generally to the search of the apartment and bedroom that they shared, as it was
13 established law that she had such authority. The United States Supreme Court confirmed in
14 *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), a case involving
15 a common law wife sharing a bedroom with the defendant, that the voluntary consent of any
16 joint occupant of a residence to search the jointly occupied premises is valid against another
17 co-occupant. 415 U.S. at 169-172, 94 S.Ct. at 992-93.³² Ninth Circuit case law following
18 *Matlock* further supported the conclusion that a female occupant retained such actual
19 authority even where she had left the domicile in a domestic dispute while leaving behind her
20 belongings in the joint domicile. See *United States v. Brannan*, 898 F.2d 107, 108 (9th Cir.
21 1990); *United States v. Long*, 524 F.2d 660, 661 (9th Cir. 1975). Accordingly, a conclusion

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23 ³¹The state courts rejected the petitioner's claims without an evidentiary hearing, and this Court
24 therefore has assumed, *arguendo*, that the petitioner's sworn material factual allegations in his state petition
25 are true. However, on a motion to suppress, the petitioner's factual allegations would have been subject to a
26 determination as to his credibility as against any contrary testimony and other evidence offered through other
27 witnesses. State post-conviction counsel made an unsworn statement in an appellate brief that Scott's
28 original police statement supported Nellums' argument that Scott knew that she did not have access to the
top drawer of the night stand. #15-14, Ex. 5A, at 15. It does not appear that any evidence was presented to
the state courts supporting this bald and unsworn allegation that was made for the first time on appeal.

³²See also *United States v. Wilson*, 447 F.2d 1, 5-6 (9th Cir. 1971)(girlfriend living with defendant in
apartment could validly consent to search of the apartment even though she did not pay rent).

1 that Nellums' co-tenant Scott retained her actual authority to consent to a search of the
2 premises and shared bedroom would not have been either contrary to or an unreasonable
3 application of clearly established federal law, regardless of the then-current status of their
4 relationship with one another. As petitioner acknowledged in the state courts, Scott was a co-
5 tenant with common authority generally over the premises on the date of the search.³³

6 Nellums' principal argument in the state courts instead focused upon whether Scott
7 had actual authority to consent specifically to a search of the top drawer of the night stand
8 where the murder weapon was found – based upon his allegation that he forbade her access
9 to that particular drawer of the night stand.

10 The Nevada Supreme Court's implicit conclusion that Scott's actual authority extended
11 to a search of the particular drawer was neither contrary to nor an unreasonable application
12 of clearly established federal law. The Ninth Circuit held in *United States v. Sealey*, 830 F.2d
13 1028 (9th Cir. 1987), that a wife and co-owner of the residence had actual authority to permit
14 a search of all areas of the home, including the garage that her husband had forbade her to
15 go into. There was nothing establishing that the husband in fact actually *had the authority* to
16 deny the wife equal access by forbidding or restricting her access to the garage, and "[a]s part
17 owner and occupant, [the wife] had mutual access to the entire premises and valid authority
18 to consent to the search of the garage." 830 F.2d at 1031. The Ninth Circuit further rejected
19 the husband's argument in *Sealey* that the wife did not have the authority to consent to the
20 search of covered plastic buckets and sealed PVC pipes in the garage. The Court of Appeals
21 noted, first, that the containers were not marked in any way to indicate the husband's alleged
22 sole ownership, second, that the wife did not disclaim an ownership interest in them, and
23 third, that the containers were not the sort of containers – such as suitcases, strong boxes,
24 and footlockers – commonly used to preserve privacy. The Ninth Circuit accordingly held that

25
26 ³³See also *United States v. Guzman*, 852 F.2d 1117, 1121-22 (9th Cir. 1988)(possession of a key by
27 the defendant's wife who was a lessee and occasional resident of the apartment "in itself" had "special
28 significance"); accord *United States v. Yarbrough*, 852 F.2d 1522, 1534 (9th Cir. 1988)("A party who 'has the
key to the premises and access throughout the residence" can give valid consent to search."); *United States*
v. Dubrofsky, 581 F.2d 208, 212 (9th Cir. 1978)(similar).

1 the wife “had valid authority to consent to the search of the sealed containers.” 830 F.2d at
2 1030-31.³⁴

3 The cases from other jurisdictions upon which petitioner relies in his argument as to
4 the particular drawer all concerned the type of containers that the Ninth Circuit distinguished
5 in *Sealey*, *i.e.*, containers commonly used to preserve personal privacy in a shared area, such
6 as a suitcase, strong box, footlocker, duffel bag, or purse.³⁵ Petitioner cites no controlling
7 authority holding that a particular drawer in a night stand by a shared bed is the type of
8 container typically used to preserve privacy as against the other person sharing the bedroom.
9 In all events, cases decided by other state courts or by federal lower courts – even if
10 otherwise on point – were not binding up on the Nevada Supreme Court. As a state supreme
11 court, the court was bound only by controlling United States Supreme Court precedent.

12 Moreover, even within the context of containers commonly used to preserve personal
13 privacy, the United States Supreme Court has disapproved of the sort of constitutional parsing
14 between portions of a shared container such as Nellums attempts to do here. In *Frazier v.*
15 *Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), two cousins shared a duffel bag
16 but the defendant cousin claimed that his cousin had permission to use only one
17

18 ³⁴See also *Sealey*, 830 F.3d at 1032 (Norris, J., concurring in part and dissenting in part)(while
19 disagreeing with the majority regarding the constitutional validity of sawing open the sealed PVC pipes, the
20 partially dissenting judge stated that the wife’s “consent to search for drugs was broad enough to authorize
the officers to open bureau drawers”); *United States v. Cornejo*, 598 F.2d 554, 556 (9th Cir. 1979) (lessee
validly consented to search of dresser where weapon was found).

21 In citing to Ninth Circuit authority, this Court does not suggest that the Supreme Court of Nevada was
22 bound to follow Ninth Circuit precedent. However, if Ninth Circuit law at the relevant time held to the contrary
23 of the petitioner’s argument, it would not have been an objectively unreasonable application of clearly
established federal law for the state supreme court to also reject the argument.

24 ³⁵See *State v. Evans*, 45 Haw. 622, 632, 372 P.2d 365, 372 (1962)(cufflink case that “clearly was
25 identifiable as the husband’s,” with the court stating “we do not have here the situation where, at the time of
the search, it does not appear whose case is being opened”); *United States v. Block*, 590 F.2d 535, 541 & n.8
26 (4th Cir. 1978)(mother did not have authority to consent to search of son’s footlocker, with the court stating
that “[o]bviously, not every ‘enclosed space’ within a room . . . can claim independent status as objects
capable of search”); *In re Scott K.*, 24 Cal.3d 395, 595 P.2d 105 (1979)(father did not have authority to
27 consent to search of son’s locked toolbox as to which the father had disclaimed any ownership interest);
State v. Williams, 48 Or.App. 293, 616 P.2d 1178 (1980)(latched cassette tape case located in van); *United*
28 *States v. Poole*, 307 F.Supp. 1185 (E.D. La. 1969)(apartment guest’s closed overnight bag in closet).

1 compartment within the bag, such that he did not have consent to a search of the remaining
2 compartments in the bag. The United States Supreme Court declined to “engage in such
3 metaphysical subtleties,” and the Court held that the defendant had assumed the risk that his
4 cousin would allow someone else to access the shared bag. 394 U.S. at 740, 89 S.Ct. at
5 1425. In the present case, Nellums acknowledged that he and Scott shared the night stand
6 in the shared bedroom, but he maintained that she had permission to use only one drawer
7 in the night stand. The Nevada Supreme Court’s rejection of such a Fourth Amendment
8 argument was not an unreasonable application of the clearly established federal law in
9 *Frazier*.

10 Ninth Circuit case law at the time of the petitioner’s trial similarly was in accord that a
11 defendant could create actual authority in a third party to validly consent to a search by virtue
12 of conduct by the defendant that assumed the risk that the third party might access the area
13 without the defendant’s permission. *See, e.g., United States v. Kim*, 105 F.3d 1578, 1582-83
14 (9th Cir. 1997).

15 The Nevada Supreme Court’s rejection of Nellums’ claim that Scott did not have actual
16 authority to consent to a search of the particular drawer in the night stand where the murder
17 weapon was found therefore was neither contrary to nor an unreasonable application of
18 clearly established federal law as determined by the United States Supreme Court during the
19 period of time at issue.

20 Even if, *arguendo*, Scott did not have actual authority to consent to a search
21 specifically of the top drawer of the night stand, the search of the drawer nonetheless would
22 be valid if she had apparent authority, *i.e.*, if the officers had an objectively reasonable belief
23 that Scott had authority over the entire premises including the top night stand drawer as well.
24 *See Illinois v. Rodriguez*, 497 U.S. 177, 186-89, 110 S.Ct. 2793, 2800-02, 111 L.Ed.2d 148
25 (1990). Nellums contends that the officers had a duty to inquire specifically whether Scott had
26 access to the top drawer of the night stand. He cites no apposite and controlling authority,
27 however, imposing such a duty upon the officers on the facts of this case. There is nothing
28 inherent to a particular drawer of a shared night stand in a shared bedroom – a night stand

1 that otherwise can be searched – that would put a reasonable officer on notice that the drawer
2 was accessible only to one of the occupants of the shared room but not the other. A rejection
3 of Nellums’ claim that the officers did not have an objectively reasonable belief that Scott had
4 authority to consent to the search of the particular drawer was neither contrary to nor an
5 unreasonable application of *Illinois v. Rodriguez* and clearly established federal law.³⁶

6 Nellums further contended in the state courts that the search was constitutionally
7 invalid because the police allegedly deliberately arrested him and took him away from the
8 apartment without seeking his consent so that they instead could proceed with the search
9 based upon Scott’s consent.

10 The Nevada Supreme Court’s rejection of this argument was neither contrary to nor
11 an unreasonable application of clearly established federal law, based upon the controlling
12 United States Supreme Court case law available at the time of the petitioner’s trial. That is,
13 under the controlling case law at the time, a determination that this argument would not have
14 had a reasonable probability of success was not an objectively unreasonable application of
15 then clearly established federal law.

16 Notably, in *United States v. Matlock*, the police similarly arrested the defendant outside
17 the residence and asked a third party for consent to search without instead asking the
18 defendant himself. See 415 U.S. at 166, 94 S.Ct. at 991. At the time of the petitioner’s
19 original criminal proceedings in 1997 and 1998, the law was well-established in the Ninth
20 Circuit that a co-tenant could validly consent to a search of the premises even if another co-

21
22 ³⁶See also *State v. McCaughey*, 127 Idaho 669, 904 P.2d 939 (1995)(officers did not know of steps
23 taken by husband to keep wife out of shed and basement and therefore reasonably believed that wife had
24 authority to consent to search these areas).

25 Petitioner relies upon *Nix v. State*, 621 P.2d 1347 (Alaska 1981), for the proposition that the police
26 may not proceed without inquiry in ambiguous circumstances. The court held in *Nix*, however, that the
27 officers did reasonably believe that the third party had authority to consent to the search, and the facts in *Nix*
28 are entirely distinguishable from the present case. The presence of a night stand with drawers does not
present ambiguous circumstances. Petitioner’s reliance upon *United States v. Isom*, 588 F.2d 858 (2d Cir.
1978), similarly is misplaced. That case involved a search of a guest’s locked box, and the court ultimately
ruled that the search was valid on other grounds. A night stand drawer is not a locked box. Moreover, again,
the Supreme Court of Nevada was not required to follow either Alaska or federal Second Circuit authorities.

1 tenant expressly objected to the search. See *United States v. Morning*, 64 F.3d 531, 534-36
 2 (9th Cir. 1995); *United States v. Valencia-Roldan*, 893 F.2d 1080, 1081-82 (9th Cir. 1990)(in
 3 *Valencia-Roldan*, one co-tenant consented and another co-tenant other than the defendant
 4 objected); see also *United States v. Childs*, 944 F.2d 491, 494-95 (9th Cir. 1991). There was
 5 no Ninth Circuit case law holding that a co-tenant's consent to the search was valid only so
 6 long as the police had not removed the defendant to avoid a possible objection. The search
 7 would have been valid under then-current Ninth Circuit precedent even if Nellums had
 8 remained at the scene and objected to the search consented to by his co-tenant Scott.³⁷

9 Well after the petitioner's trial, direct appeal, and post-conviction appeal, the United
 10 States Supreme Court held in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164
 11 L.Ed.2d 208 (2006), that a warrantless search is invalid where one occupant refuses
 12 permission to search even though another occupant with authority consents to the search.
 13 547 U.S. at 120. The Court further held that a co-tenant's consent to search is valid only so
 14 long as there is no evidence that the police removed the potentially objecting tenant for the
 15 sake of avoiding a possible objection. 547 U.S. at 121.

16 As noted at the outset, because an attorney's performance must be assessed from the
 17 lawyer's perspective at the time, it is established law that an attorney is not ineffective for

18
 19 ³⁷Petitioner urges that the Ninth Circuit held in *United States v. Impink*, 728 F.2d 1228 (9th Cir. 1984),
 20 that the police must invariably seek consent from the suspect before relying upon third party consent. #1, at
 21 electronic docket page 27 of 51. The Ninth Circuit instead stated exactly the opposite: "We *do not* hold that
 22 police must invariably seek consent from the suspect before relying on a third party's consent." 728 F.2d at
 23 1234 (emphasis added). Moreover, *Impink* involved a case where the defendant tenant had a superior
 24 privacy interest in the property to the landlord. In both *Morning* and *Valencia-Roldan*, the Ninth Circuit
 25 declined to extend *Impink* to a situation where, *inter alia*, co-tenants enjoyed an equal right of access to the
 26 property, and the Court of Appeals held that one co-tenant could constitutionally authorize a search even
 27 when another co-tenant was present and objected to the search. *Morning*, 64 F.3d at 535; *Valencia-Roldan*,
 28 893 F.2d at 1081-82. The Supreme Court of Nevada in all events was not required to follow a holding of the
 Ninth Circuit in determining whether a motion to suppress would have been granted, much less any *dicta*
 found in *Impink*.

The Nevada Supreme Court further was not required to follow the federal district court decision in
United States v. Ruffner, 51 F.2d 579 (D.Md. 1931), which involved consent by an employee rather than a co-
 tenant and which was decided over 40 years prior to the Supreme Court authority in *Matlock*. Nor was the
 state high court required to follow the Tennessee appeals court decision in *Hembree v. State*, 546 S.W.2d
 235 (Tenn.Cr.App. 1976), which involved consent to search by a son. The Nevada Supreme Court, again, is
 bound only by United States Supreme Court authority existing at the relevant time.

1 failing to anticipate a decision in a later case. *See, e.g., Murtishaw, supra*. Trial counsel
 2 accordingly was not ineffective for failing to anticipate the Supreme Court's decision in
 3 *Georgia v. Randolph* nearly a decade later. If further was not an objectively unreasonable
 4 application of clearly established federal law for the Nevada Supreme Court to conclude in
 5 2005 that there was not a reasonable probability that Nellums' argument would have proved
 6 successful under the controlling law in 1997 and 1998. *See Morning, supra*.³⁸

7 Finally, Nellums contended that the search was unconstitutional because the police
 8 allegedly had a duty to instead obtain a search warrant because a neutral magistrate was
 9 easily available to the police. The cases upon which he relies do not involve a situation where
 10 consent to search was obtained and do not support the broad proposition made.³⁹

11 Accordingly, the Nevada Supreme Court's conclusion that counsel was not ineffective
 12 for failing to file a motion to suppress -- because the motion would not have had more than
 13 a remote chance of success -- was neither contrary to nor an unreasonable application of
 14 clearly established federal law as of the time of the petitioner's trial.⁴⁰

15 With particular regard to the claim of ineffective assistance of appellate counsel in
 16 federal Ground 2, appellate counsel similarly was not ineffective for failing to pursue a claim
 17 with only a remote chance of success at best under then-existing law. Moreover, it would
 18 have been futile to pursue a claim on appeal that had not been raised in the district court.

19 Grounds 1 and 2 therefore do not provide a basis for federal habeas relief.

20
 21 ³⁸In the federal reply, petitioner alleges for the first time -- in his argument under the new decision in
 22 *Georgia v. Randolph* -- not merely that he was taken away without being asked for his consent to the search
 23 but that he in fact vigorously objected to the search. While this factual allegation was not presented to the
 state courts, Nellums' *arguendo* actual objection to the search would not have made a difference under then-
 existing case authorities such as *Morning*.

24 ³⁹The holding in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971),
 25 was that a warrant issued through an enforcement officer, the Attorney General, rather than through a neutral
 magistrate was invalid. The district court decision in *United States v. Brewer*, 343 F.Supp. 468 (D. Hawaii
 1972), did not involve consent to search and was not binding upon the Supreme Court of Nevada.

26 ⁴⁰*See also United States v. Fay*, 410 F.3d 589, 590-91 (9th Cir. 2005)(Noonan, J., concurring)(a felon
 27 living with his girlfriend who tells her that he is keeping a gun in the house has no privacy claim that prevents
 28 her from disassociating herself from his criminal conduct and from ridding her home of the gun by asking the
 police to remove it).

Ground 7: Failure to Collect and Preserve Evidence from Knife

In Ground 7, petitioner alleges that he was denied effective assistance of counsel when trial counsel failed to collect and preserve fingerprint, blood and DNA evidence from a knife allegedly recovered by the State.⁴¹

According to Hilario Rodriguez' trial testimony, when he approached his father after the assailant left, he saw a knife in his hand. It was a folding knife that opened with a push-button. His father still was alive at that point, and he said to Hilario Rodriguez: "This asshole really kill us." Rodriguez took the knife from his father, and he later gave the knife to a friend

⁴¹Petitioner voluntarily dismissed the unexhausted claims in Grounds 3 through 6.

In the federal reply (#25), petitioner asserts – for the first time – distinct new legal claims that trial counsel was ineffective: (a) for failing to object to the alleged perjured testimony at the preliminary hearing that Hilario Rodriguez did not know anything regarding a knife; (b) for failing to investigate the whereabouts of the knife; and (c) for failing to object and seek a mistrial during the State's opening statement when the State referred to the knife. These new legal claims were not presented in state Ground 7, and it does not appear likely that the claims were exhausted in the state courts. To exhaust a federal claim in the state courts, the petitioner must present *both* the operative facts and the federal legal theory upon which the claim was based. *E.g., Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). None of the above bases of alleged ineffective assistance were presented in state Ground 7.

In this Court, subsequent to the reply, petitioner filed a motion to stay the proceedings so that he could pursue another unexhausted claim. The Court struck the motion because petitioner did not properly serve the motion on opposing counsel. However, the Court gave the petitioner an opportunity to file an amended petition. The Court informed the petitioner that – given the late juncture in these proceedings – any motion to amend would have to demonstrate – separately as to any new claim or allegation – that the amendment would not be futile given considerations of, *inter alia*, exhaustion, procedural default, and timeliness. See #27. Petitioner never took the opportunity to seek leave to amend to add new claims.

Given the procedural history herein, including the petitioner's failure to seek leave to amend the petition after being given an opportunity to do so, the Court will not consider any new legal claims raised for the first time in the federal reply. Under Rule 15 of the Federal Rules of Civil Procedure, the procedure for presenting new claims after the respondents have answered is by seeking leave to amend, not by inserting new claims for the first time in the federal reply.

The Court further notes that the new claims in any event would appear to be without merit. *First*, from the record presented, it does not appear that defense counsel would have been aware at the time of the preliminary hearing that Rodriguez was not testifying truthfully about a knife. Nor is it likely that alleged perjury at the preliminary hearing would provide a basis for any relief at the subsequent trial, particularly where the testimony was corrected at trial and the varying testimony was explored on cross-examination. *Second*, the record presented does not reflect that defense counsel had information prior to trial that would lead to the discovery of the whereabouts of the knife. Moreover, even more significantly, as discussed in the text with regard to the exhausted claim in federal Ground 7, it is entirely speculative that forensic testing of the knife, if ever found, in fact would have produced exculpatory evidence. *Third*, the State's reference to the knife in its opening statement would not appear to provide a basis for a mistrial.

1 to hold. He took the knife from his father at the scene because he did not want his father to
2 get into trouble for having a knife, as they were not in the United States legally. He later gave
3 the knife to his sister as a memento, and, as of the trial, he had not seen the knife after that
4 time.⁴²

5 Antonio Meza testified that Hilario Rodriguez gave him a folding knife with a push-
6 button. He gave the knife back to Rodriguez after he left the hospital. Rodriguez did not say
7 anything to Meza as to why he wanted him to hold the knife.⁴³

8 During his preliminary hearing testimony, Rodriguez denied any knowledge of a knife.⁴⁴

9 At the time of the initial investigation, police officers and crime scene investigators
10 observed blood on the ground near the father's body. Crime scene investigator Derek Nelson
11 observed blood on the ground and also blood on a guard rail. Nelson photographed the blood
12 but did not collect any samples because he had no information at the time that the blood was
13 from anyone other than the victim.⁴⁵

14 According to the testimony of Detective Jonathan Martin, the police learned for the first
15 time that Nicholas Rodriguez had cut Nellums with a knife when Priscilla Scott gave her
16 statement to the police on June 18, 1997, nearly three month after the crime. No one had
17 stated anything to the police regarding a knife at any point prior to that time, and the police
18 did not have any information that the assailant had been cut with a knife when they did their
19 initial investigation in March 1997.⁴⁶

20 In the present claim, petitioner challenges trial counsel's failure – once the knife
21 allegedly was discovered by the State well after the fact – to have fingerprint, blood, and DNA
22

23 ⁴²#15, Ex. 2A, at 61-64.

24 ⁴³#15, Ex. 2A, at 86-88.

25 ⁴⁴#15, Ex. 2A, at 75-76.

26 ⁴⁵#15, Ex. 2A at 43 (first responding patrol officer); *id.*, Ex. 2B, at 26 (Detective Martin); *id.*, Ex. 2B, at
27 34-39 & 47-49 (Nelson); see also #15, Ex. 2A, at 105 (Maria Rodriguez).

28 ⁴⁶#15, Ex. 2B, at 12-13 & 29-30 (Detective Martin).

1 testing conducted on the knife. He alleged in the state courts, without tendering any
2 supporting evidence, that the results of such testing would have been exculpatory.

3 The Supreme Court of Nevada rejected this claim on the following grounds:

4 [T]rial counsel's decision to forego investigation of the knife
5 used by the victim to attack his assailant was reasonable. Going
6 further, in light of the substantial evidence in the record that
7 supports the State's case, Nellums has not demonstrated any
prejudice from this alleged failure. In particular, police obtained
concrete physical evidence from Nellums' residence, including a
weapon and a jacket, that tied Nellums to the offense.

8 #15-17, Ex. 8, at 3.

9 The Nevada Supreme Court's rejection of this claim was neither contrary to nor an
10 unreasonable application of *Strickland*.

11 At the very outset, Nellums presents this claim as though the State disclosed at trial
12 that it knew the whereabouts of the knife. Petitioner supports this proposition, however, by
13 citing to Hilario Rodriguez' testimony at trial, in which he states that he gave the knife to his
14 sister and that he had not seen the knife since that time.⁴⁷ This testimony does not at all
15 establish that the State then had the knife in its possession, that the State then in fact could
16 obtain it, or that trial counsel then would have been able to arrange for forensic testing of the
17 knife in the middle of the trial. The underlying premise of this claim – that trial counsel could
18 have conducted forensic testing of the knife – thus is entirely speculative and suspect.
19 Nothing in the record establishes that the knife in fact was available for forensic testing.

20 In any event, petitioner's claim that forensic testing of the knife would have resulted in
21 exculpatory evidence also was entirely speculative. Under Nevada state post-conviction
22 practice, a petitioner must attach affidavits, records or other evidence supporting the factual
23 allegations of the petition, and he may not present merely an unsubstantiated claim. See
24 N.R.S. 34.370(4). Petitioner's claim that forensic testing of the knife – if the knife in fact had
25 been available for testing – would have produced exculpatory evidence was wholly
26 unsubstantiated and based upon nothing more than speculation.

27
28 ⁴⁷Compare #1, at electronic docket page 46 of 51 with #15, Ex. 2A, at 61-64.

1 Finally, the evidence against Nellums – including evidence establishing without doubt
 2 that his .25 caliber handgun was the murder weapon – was overwhelming. Petitioner did not
 3 tender evidence to the state courts tending to demonstrate that there was a reasonable
 4 probability that forensic testing of the knife would have produced evidence that would have
 5 outweighed the substantial evidence of guilt.

6 The state high court's rejection of this claim accordingly was neither contrary to nor an
 7 unreasonable application of clearly established federal law.

8 Ground 7 therefore does not provide a basis for federal habeas relief.

9 ***Ground 9: Failure to Introduce Medical Records***

10 In Ground 9, petitioner alleges that he was denied effective assistance of counsel when
 11 trial counsel failed to present Nellums' medical records at trial to rebut evidence that he had
 12 been cut on his left arm during the shooting and murder.⁴⁸

13 Petitioner attached with his state petition purported medical records from the University
 14 Medical Center for an admission on May 8, 1991, for stab wounds. Petitioner maintains that
 15 the medical records from six years prior to the shootings would have established a different
 16 cause for the scar or scars on his left arm other than being cut by Nicholas Rodriguez.⁴⁹

17 Petitioner alleges that he asked counsel to obtain the records, but he did not do so.

18 The Supreme Court of Nevada rejected this claim on the following grounds:

19 [A]lthough the failure to acquire Nellums' medical records
 20 concerning a prior arm injury was arguably unreasonable,
 21 Nellums has shown no prejudice from the failure. Detective
 22 Martin and Priscilla Scott both testified that Nellums received a
 23 cut on his arm on the night of the incident. Thus, we conclude
 24 that Nellums failed to demonstrate a reasonable probability, that,
 25 but for counsel's alleged error, the result of the proceeding would
 26 have been different.

27 #15-17, Ex. 8, at 3.

28 *///*

⁴⁸Petitioner voluntarily dismissed the unexhausted claim in Ground 8.

⁴⁹#15-12, Ex. 4, Exhibit E002 thereto, at electronic docket pages 15-17 of 23. The alleged medical records are cryptic and barely legible, but they are not necessarily inconsistent with petitioner's allegations.

1 The state high court's rejection of this claim was neither contrary to nor an unreasonable
 2 application of *Strickland*. Petitioner faced overwhelming evidence at trial, including evidence
 3 that the fatal bullet came from his .25 caliber handgun. It was not an objectively unreasonable
 4 application of clearly established federal law for the state supreme court to conclude that
 5 there was not a reasonable probability that producing evidence that a scar or scars on
 6 Nellums' arm may have come from another incident would have affected the outcome at
 7 trial.⁵⁰

8
 9 ⁵⁰Petitioner relies in his reply upon *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389
 10 (2000), for the proposition that he had a constitutionally protected right to present mitigating evidence.
 11 *Williams* involved a failure to present mitigating evidence during the penalty phase of a capital murder trial.
Williams has nothing to do with issues concerning the presentation of potential exculpatory evidence in the
 guilt phase of a trial.

12 Petitioner further urges in a "summary" section of his federal reply, *inter alia*, that, but for trial
 13 counsel's "ill advice" to not testify because of his felony conviction on the weapon charge, he would have
 14 taken the stand in his own defense and testified that he purchased the handgun almost a month after the
 shootings. He maintains in the summary section that his conviction should be set aside because of "all of the
 cumulative ineffective assistance of trial counsel errors." #25, at 15-17.

15 Looking specifically at Ground 9, these new, and apparently unexhausted, allegations have no
 16 bearing upon the Nevada Supreme Court's rejection of that claim. The record before the state supreme court
 17 did not contain any evidence tending to establish that petitioner did not own the gun at the time of the
 18 shootings, and all of the available evidence in the state trial record – including in particular Scott's testimony –
 19 instead tended to establish that Nellums both owned and used the gun in murdering Nicholas Rodriguez and
 shooting Hilario Rodriguez. Petitioner's late-breaking allegations in federal court as to what he "would have"
 testified to "if" he had taken the stand nearly a decade earlier do not render the state supreme court's
 assessment of prejudice on Ground 9 – based upon the evidence that instead actually was in the state trial
 record – either contrary to or an unreasonable application of *Strickland*.

20 To the further extent that petitioner seeks in his "summary" section in the reply to present new claims
 21 for the first time separate and apart from Ground 9, the Court declines to consider the claims. As discussed
 22 in more detail in note 41, *supra*, the petitioner was afforded an opportunity on a different claim to seek leave
 23 to amend to add new claims but did not avail himself of that opportunity. Under Rule 15 of the Federal Rules
 of Civil Procedure, the procedure for presenting new claims after the respondents have answered is by
 seeking leave to amend, not by inserting new claims for the first time in the federal reply.

24 The new and apparently unexhausted claims in the "summary" section of the reply further in any
 25 event would appear to be without merit. *First*, any ineffective assistance claim based upon allegedly
 26 erroneous advice to not testify would appear to be without merit. The rule in the Ninth Circuit is that a
 27 knowing and voluntary waiver of the right to testify is presumed when a defendant sits silently by when his
 28 attorney does not call him during the defense case-in-chief. *See, e.g., United States v. Pino-Noriega*, 189
 F.3d 1089, 1094-95 (9th Cir. 1999). The state trial record reflects that the state trial judge fully advised
 Nellums of his rights concerning taking the stand in his own defense. Trial counsel initially stated at that time
 that he understood that it was Nellums intention to testify. However, when the State rested on the record a


(continued...)

1 Ground 9 therefore does not provide a basis for federal habeas relief.

2 IT THEREFORE IS ORDERED that the remaining claims in the petition for a writ of
3 habeas corpus shall be DENIED on the merits and that this action shall be DISMISSED with
4 prejudice.⁵¹

5 The Clerk of Court shall enter final judgment accordingly, in favor of respondents and
6 against petitioner, dismissing this action with prejudice.

7 DATED: September 5, 2008.

8
9
10 
11 ROGER L. HUNT
12 Chief United States District Judge
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20 ⁵⁰(...continued)

21 short time later, defense counsel stated that the defense was calling no witnesses and rested. The record
22 does not reflect any on-record action by Nellums challenging defense counsel's action in resting without
23 presenting his testimony. See #15, Ex. 2B, at 94-98. This Court further is not sanguine that there was a
24 reasonable probability that self-serving testimony by Nellums that he purchased the weapon after the
25 shootings – rather than before as Scott testified – would have changed the outcome at trial. *Second*, there is
no freestanding actual innocence claim in noncapital habeas. See *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct.
853, 122 L.Ed.2d 203 (2006). *Third*, the Court is not persuaded that petitioner has presented claims of
cumulative ineffective assistance that have any more merit in the aggregate than they have in isolation as
separate claims.

26 ⁵¹To the extent that petitioner challenges his conviction for possession of a firearm by an ex- felon,
27 none of the circumstances presented in the foregoing claims, viewed objectively, would have prompted a
28 defendant in Nellums' situation to not enter a plea and instead insist on going to trial on the weapon charge.
The claims therefore do not provide a basis for overturning that conviction. See *Tollett v. Henderson*, 411
U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203
(1985).